BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANGELA JENSEN	)	
Claimant	)	
V.	)	CS-00-0440-569
	)	AP-00-0450-500
STATE OF KANSAS	)	
Self-Insured Respondent	)	

ORDER

The self-insured respondent, the State of Kansas (the State), through Nathan Burghart, requested review of Administrative Law Judge (ALJ) Steven Roth's April 1, 2020 Award. George Pearson appeared for the claimant, Angela Jensen (Jensen). The Board heard oral argument on July 16, 2020.

RECORD AND STIPULATIONS

The Board considered the record and adopted the Award's stipulations.

ISSUES

1. Did the ALJ properly quash the depositions of the State's representatives who intended to testify regarding Jensen's termination from employment?

2. Is Jensen's work accident the prevailing factor for her injuries, medical condition, need for treatment and resulting impairment or disability?

3. What is the nature and extent of Jensen's disability, including whether she is entitled to work disability benefits?

4. Is Jensen entitled to future medical treatment?

FINDINGS OF FACT

Jensen, a nurse, worked for the State at the Kansas Neurological Institute (KNI). She helped neurologically disabled adults perform activities of daily living.

On July 21, 2018, Jensen slipped on water and fell on tiled concrete, striking her knees first and then her elbows and palms on the floor. She also hit her head. She testified her hands went numb and she had immediate bilateral wrist pain. Jensen denied prior hand or wrist problems. This claim only concerns Jensen's upper extremities.

Jensen received medical treatment. Kenneth Teter, M.D., operated on Jensen twice. Dr. Teter performed a left carpal tunnel release and a left wrist first extensor compartment release on September 14, 2018, followed by a right carpal tunnel release on November 30, 2018. Dr. Teter released Jensen at maximum medical improvement (MMI) on February 19, 2019.

Jensen returned to her regular work for six weeks before her employment with KNI ended. KNI's interim HR director, Sheila Denning, left Jensen a voice mail message in April 2019. In the voice mail message, Ms. Denning indicated she was reading from a letter stating Jensen was dismissed from her employment immediately. No reason for Jensen's separation of employment was provided in the voice mail message. Jensen testified she never received a letter of termination and was never told why her employment was terminated. Jensen denied meeting with human resources or being disciplined between returning to work and losing her job. Jensen applied for and received unemployment benefits for three or four months. The State did not contest her entitlement to unemployment benefits.

At the State's request, Jensen saw John Moore, M.D., who is board certified in plastic and reconstructive surgery, with an added qualification in hand surgery. The doctor diagnosed Jensen with subjective pain following surgeries. Using the AMA *Guides to the Evaluation of Permanent Impairment,* 6th ed. (*Guides,* 6th ed.), Dr. Moore assigned Jensen a 15% whole person impairment. He imposed no permanent restrictions and opined Jensen will not require additional medical treatment. Dr. Moore opined Jensen's work accident was not the prevailing factor for her diagnoses because, in his opinion, carpal tunnel syndrome (CTS) is caused by months or years of repetitive work and almost never caused by a single incident, especially based on his understanding Jensen's fall was of "relatively minor severity."[1]

At her attorney's request, Jensen saw Anne Rosenthal, M.D., a board-certified orthopedic surgeon specializing in hands and upper extremities. The doctor diagnosed Jensen with left de Quervain's tenosynovitis and bilateral CTS. Dr. Rosenthal opined the work-related fall was the prevailing factor for Jensen's injuries. Dr. Rosenthal specifically disagreed with Dr. Moore's opinion regarding causation.[2] Dr. Rosenthal recommended nerve tests on both arms and predicated future medical based on testing results. In the doctor's opinion, if the testing showed worsening, Jensen could be a candidate for additional surgery. If the testing showed improvement, Jensen should keep doing occupational therapy and proceed to work conditioning. Jensen never obtained the additional nerve testing.

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[1] Moore Depo. at 14.

[2] See Rosenthal Depo. at 20-21.

Using the *Guides,* 6th ed., Dr. Rosenthal rated Jensen as having a combined 12% whole person impairment. Using the AMA *Guides to the Evaluation of Permanent Impairment,* 4th ed. (*Guides*, 4th ed.), Dr. Rosenthal assigned Jensen a combined 35% whole person impairment. She provided permanent restrictions to occasionally use both hands, no repetitive use of either hand (including no repetitive gripping, grasping or pinching), no repetitive twisting of either upper extremity, as well as no lifting over five pounds with her right hand.

Dr. Rosenthal issued a letter dated July 24, 2019, regarding Jensen's loss of task performing ability based on a list of 10 tasks prepared by a vocational rehabilitation expert hired by Jensen, Doug Lindahl. In her testimony, Dr. Rosenthal opined Jensen was unable to perform 8 of the 10 tasks for an 80% task loss. The doctor also reviewed a list of 20 tasks prepared by a vocational rehabilitation expert who was hired by the State, Karen Terrill. Dr. Rosenthal opined Jensen was unable to perform 15 tasks for a 75% task loss.

Jensen saw Rodney Bishop, M.D., for a court-ordered independent medical examination. Dr. Bishop is board certified in internal medicine and a fellow of the International Academy of Independent Medical Evaluators. The doctor diagnosed Jensen with bilateral CTS and left de Quervain's tendonitis. Like Dr. Rosenthal, Dr. Bishop opined the prevailing factor for Jensen's injuries was the work-related fall. Also similar to Dr. Rosenthal, Dr. Bishop disagreed with Dr. Moore's stance that Jensen could not have developed CTS due to her fall. Dr. Bishop testified:

> Well, I disagree with it, because I think that's an overly broad statement. He's basically saying it never occurs as a result of what you and I might agree to call moderate to modest to even mild or moderate trauma and I think that's a, that's a remarkable statement. I think it's overly broad.[3]

Dr. Bishop stated Jensen will "more likely than not" require future medical treatment, but the specifics of care cannot be accurately predicted.[4]

Using the *Guides,* 6th ed., Dr. Bishop issued Jensen a combined 14% whole person impairment. Using the *Guides,* 4th ed., Dr. Bishop rated Jensen as having a combined 32% whole person impairment. He restricted her to occasional use of her hands, but no repetitive use, gripping, grasping, pinching or twisting with either upper extremity. Further, Jensen should avoid activities requiring fine dexterity and lifting more than 5 pounds with either hand. Of the 20 tasks on Ms. Terrill's task list, Dr. Bishop opined Jensen was unable to perform 8 tasks for a 40% task loss. Using Mr. Lindahl's list, Dr. Bishop indicated Jensen had a 55% task loss.

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[3] Bishop Depo. at 30.

[4] *Id.*, Ex. 2 at 8.

Prehearing settlement conferences were held on June 18, 2019, and August 15, 2019. Thereafter, the ALJ signed documents titled "Pretrial Settlement Conference Stipulations" which contain the following contradiction: (1) "Work disability/permanent total disability are not presently at issue in this case" and (2) "Does the Claimant have a work disability and, if so, what is the nature and extent of that work disability?"[5]

The regular hearing was held on October 10, 2019. ALJ Roth stated, "The attorneys as well as the Court met previously and took some stipulations. It would be my intention to go over those and make them controlling for any type of award that would be issued out of this matter. So if your positions have changed or the-- I misspeak in any way, make sure that you bring that to my attention."[6] Jensen's attorney corrected the ALJ and clarified she was indeed pursuing a work disability award. The State's attorney did not identify any issues other than those listed by the ALJ.

Jensen testified she continues to have constant numbness and pain in her hands and wrists, the right side being worse. She testified her hands lock up or cramp. She wears a brace on her right hand and takes prescription Naproxen twice a day and ibuprofen as needed, in addition to anxiety medication. Jensen testified her prescription medication is from Crystal Clark, whom she believes is a doctor. Regarding post-injury employment, Jensen testified she started working full-time at Wendy's on October 5, 2019, earning $9 an hour, for anticipated earnings of $360 per week. Jensen also testified Mr. Lindahl's task list most accurately described her task history.

As noted above, Mr. Lindahl and Ms. Terrill produced task lists. Mr. Lindhahl's report was dated July 13, 2019. It was Mr. Lindahl's written opinion Jensen was permanently totally disabled, but given the fact Jensen was working, he testified she was able to earn $360 per week. Ms. Terrill interviewed Jensen on August 21, 2019. Ms. Terrill's August 30, 2019 report states, "Ms. Jensen was referred . . . for the purpose of a work disability opinion."[7] Ms. Terrill opined Jensen could return to work as a companion aide, earning $9.52 per hour, under the restrictions of Drs. Bishop and Rosenthal.

The ALJ set Jensen's terminal date for November 22, 2019, and the State's terminal date for January 7, 2020. On January 3, 2020, the State scheduled depositions of Caleb Harvey and Michael Fitzgerald to occur on January 6. Also, on January 3, Jensen filed a motion to quash the depositions. Jensen was of the belief the two witnesses were being called by the State to establish her employment was terminated for cause. In her motion, Jensen argued the State had an affirmative duty to raise the issue of termination for cause earlier and it was unfair to allow the depositions to be held.

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[5] Motion to Quash Trans., Resp. Exs. B1 and B2.

[6] R.H. Trans., at 3.

[7] Terrill Depo.,Ex. 2 at 1.

A hearing on the motion to quash was held February 6, 2020. Jensen reiterated her arguments and stressed it was unfair for the State to assert she lost her job for cause after her terminal date expired. Jensen showed she was paid unemployment benefits after her termination, suggesting the State would have contested such benefits if she was fired for cause. The State asserted no duty to raise termination for cause at the prehearing settlement conferences or the regular hearing. It did not view work disability as an issue based on the prehearing orders. The State argued trial strategy allowed it to present evidence from the two witnesses to contradict Jensen's testimony after Jensen's deadline to present evidence. The State argued it would be deprived of due process of law if the depositions were quashed.

The ALJ electronically issued an Order Granting Claimant's Motion to Quash on February 14, 2020. The ALJ reasoned the State had a duty to raise termination for cause as an affirmative defense at least at the regular hearing and concluded:

> To allow this late, previously unidentified issue of termination for cause to now be introduced effectively nullifies any value in attempting [to] list either stipulations or issues at regular hearings.
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> It is regrettable that no perfect remedy is now available to balance all parties[']abilities to present all evidence possible. That acknowledged, attempting to now inject a new issue or question in controversy now that Claimant's window of opportunity to defend has closed, come[s] close, if not crosses, the line of due process.[8]

The ALJ found Jensen's work accident was the prevailing factor for her injuries, medical condition, impairment and disability, and awarded her permanent partial disability benefits based on a 50.75% work disability and future medical. The Award noted the State preserved for appeal the issue of whether the ALJ erred in quashing the two depositions.

On appeal to the Board, the State argues the fall was not the prevailing factor, and could not have caused Jensen's injuries. Alternatively, the State argues the three impairment ratings should be averaged for a 13.67% whole body functional impairment. The State contends the ALJ should have allowed Mr. Harvey and Mr. Fitzgerald to testify and it had no duty, earlier in the case, to raise termination for cause as an affirmative defense. If Jensen is entitled to a work disability, the State argues her work disability should not exceed 23.5%. Finally, the State argues future medical should be denied.

Jensen's brief accuses the State of waiting "stealthily like a snake in the grass" to spring a "secret defense" on her to "manipulate the system."[9] Otherwise, she maintains the Award should be affirmed.

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[8] Order Granting Claimant's Motion to Quash at 6.

[9] Claimant/Appellee's Brief to the Board of Appeals at 5, 8.

PRINCIPLES OF LAW & ANALYSIS

1. The ALJ did not err in quashing the depositions of the State's witnesses.

The State contends the ALJ erred in not allowing the depositions of Mr. Harvey and Mr. Fitzgerald and they would present evidence showing Jensen's employment ended for cause. K.S.A. 44-510e(a)(2)(E)(i) states, "Wage loss caused by . . . termination for cause shall in no way be construed to be caused by the injury." K.S.A. 44-510e(a)(2)(C)(ii) states a claimant needs at least a 10% wage loss directly attributable to the work injury to get a work disability award. If a claimant's wage loss is due to a termination for cause, there can be no wage loss due to the injury and, thus, no work disability award.

While the parties and the ALJ discussed whether termination for cause is an affirmative defense which must be raised by the State at a prehearing settlement conference or the regular hearing, the Board need not rule whether a respondent must disclose a defense at a particular time. Rather, the Board addresses whether the State was deprived of a meaningful opportunity to be heard.

A. Due process of law requires fairness.

Procedural due process of law requires notice and an opportunity to be heard and defend in an orderly proceeding.[10] There must be basic fair play, including "the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason."[11] Due process applies to administrative proceedings.[12]

Adams states:

> The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . .[13]

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[10] See *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

[11] 73 C.J.S. Public Administrative Law and Procedure*, §* 123.

[12] See *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

[13] *Adams v. Marshall*, 212 Kan. 595, 601-02, 512 P.2d 365 (1973).

The Board's review of an order is de novo on the record.[14] Despite our de novo review, the Board recognizes ALJs have discretion to control discovery.

K.S.A. 44-551(l)(1) states:

> Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges.

In *Hernandez*, the Kansas Court of Appeals stated:

> . . . K.S.A. 2007 Supp. 44-551(i)(l) extends to administrative law judges in workers compensation cases the power to "compel the attendance of witnesses and the production for books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state." K.S.A. 44-549 extends these same powers to the . . . Board. Our Supreme Court has broadly construed these statutes to envision procedures in a workers compensation case parallel to that permitted by our code of civil procedure and to position an ALJ in a workers compensation case as having the supervisory authority equivalent to a district judge. See *Sebelius v. LaFaver*, 269 Kan. 918, 926-27, 9 P.3d 1260 (2000). There is no question that discovery procedures reflected in our code of civil procedure are available and enforceable in a workers compensation case, whether denominated pursuant to chapter 60 or otherwise. [15]

K.S.A. 44-523 states, in part:

> (a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality.
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> . . .
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> (d) Not less than 10 days prior to the first full hearing before an administrative law judge, the administrative law judge shall conduct a prehearing settlement conference for the purpose of obtaining stipulations from the parties, determining the issues and exploring the possibility that the parties may resolve those issues and reach a settlement prior to the first full hearing.

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[14] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[15] *Hernandez v. Tyson Fresh Meats, Inc.*, No. 98,547, 2008 WL 2426347, at *3-4 (Kansas Court of Appeals unpublished opinion filed June 13, 2008).

K.A.R. 51-3-8 states, in part:

> (a) Before the first hearing takes place, the parties shall . . . confer as to what issues can be stipulated to and what issues are to be in dispute in the case . . . .
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> (b) An informal pretrial conference shall be held in each contested case before testimony is taken . . . . At these conferences the [ALJ] shall determine from the parties what issues have not been agreed upon. If the issues cannot be resolved, the stipulations and issues shall be made a part of the record.
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> (c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny . . . . Evidence shall be confined to the matters actually ascertained to be in dispute. The [ALJ] shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.
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> (d) All parties shall be given reasonable opportunity to be heard. . . .
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> (e) Permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance.

B. ALJs have broad discretion in admitting or excluding evidence.

An ALJ's control over cases is similar to a district court judge's authority, and many ALJ decisions are reviewed under the abuse of discretion standard.[16] "Control of discovery is entrusted to the sound discretion of the district court, and orders concerning discovery will not be disturbed on appeal in the absence of clear abuse of discretion."[17] An abuse of discretion occurs when: (1) no reasonable person would have taken the view adopted by the court; (2) the judicial action is based on an error of law; or (3) the judicial action is based on an error of fact"[18] or when the decision is arbitrary, fanciful, or unreasonable.[19]

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[16] See *Rogers v. ALT-A&M JV*, 52 Kan. App. 2d 213, 217, 364 P.3d 1206 (2015) (An ALJ's denial of a motion for extension of terminal dates is reviewed for an abuse of discretion, like a district court judge denying a motion for continuance.); *Hernandez,* supra (The ALJ may issue discovery orders based on K.S.A. 60-234 and K.S.A. 60-237.); *Minsky's Pizza v. Kansas Workers Comp. Appeals Bd.*, No. 97,970, 2008 WL 68727, at *5 (Kansas Court of Appeals unpublished opinion filed Jan. 4, 2008) (The ALJ declined to consider four depositions offered by the respondent. "[A]s the Board concluded, . . . it is within the ALJ's discretion whether to consider additional evidence . . . . "); and *Rodriguez v. Henkle Drilling & Supply Co.*, 16 Kan. App. 2d 728, 738, 828 P.2d 1335 (1992) (ALJ has discretion to consider expert testimony).

[17] *Kansas Med. Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 618, 244 P.3d 642 (2010); see *Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370, 383, 347 P.3d 687 (2015), *rev. denied* ___ Kan. ___, ___ P.3d ___ (Jan. 25, 2016).

[18] *State v. Edwards*, ___ Kan. ___, 2020 WL 4032856, at *8 (2020).

[19] See *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 169, 298 P.3d 1120 (2013).

Bearing in mind an ALJ and a district court judge have the same discovery powers, we note unfair surprise and trial by ambush are not favored in our state district courts.[20] In *Poore*, the Board stated: "The essence of discovery is a search for the truth. It is not a game but an enlightened procedure to encourage the resolution of cases based on merit and not on surprise and ambush."[21]

C. Parties must be given the reasonable opportunity to be heard in an expeditious manner.

The Board addressed an ALJ's refusal to consider evidence. In *Rivera*,[22] the parties intended testimony and exhibits from two of the employer's witnesses to be part of the record. Due to the employer's clerical error, the evidence was filed in a companion case, but still the wrong case. The ALJ followed her own strict rule requiring all evidence to be filed by 5 p.m. on a party's terminal date. The Board noted strict procedure should bow to the spirit of the law and honored the parties' intent for the depositions to be part of the record. Excluding evidence the parties intended to be part of the record deprived the employer of a meaningful opportunity to be heard.

In *Netherland*,[23] the employer requested an extension of time on the day its terminal date was set to expire. The employer started paying the claimant temporary total disability benefits the next day. An ALJ may extend terminal dates if the employer pays TTD during an extension. Following a motion hearing, the ALJ refused to consider two medical depositions already taken by the employer and quashed two lay witness depositions, but allowed the employer to take a different medical deposition approximately two weeks into the future. The ALJ concluded the employer was dilatory in scheduling many depositions.

The Board noted rigid rules of procedure are not required in workers compensation proceedings and parties are allowed a reasonable opportunity to present evidence. While the employer could have been more diligent, the Board found it harsh to exclude depositions which had already been obtained. The Board remanded the case and instructed the ALJ to allow the employer the opportunity to take the two depositions which were quashed and to consider the medical depositions obtained prior to the motion hearing.

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[20] *Warren v. Heartland Automotive Services, Inc.*, 36 Kan. App. 2d 758, 760, 144 P.3d 73 (2006) ("The discovery provisions of our Rules of Civil Procedure were designed . . . to do away with trial by ambush[.]").

[21] *Poore v. The Boeing Company*, No. 264,423, 2001 WL 893619, at *2 (Kan. WCAB July 20, 2001) (citing *Hawkins v. Dennis*, 258 Kan. 329, 341, 905 P.2d 678 (1995)).

[22] *Rivera v. Beef Products*, No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

[23] *Netherland v. Midwest Homestead of Olathe Operations LLC*, No. 1,073,038, 2017 WL 6275619 (Kan. WCAB Nov. 20, 2017).

The Board has also addressed whether an ALJ erred in extending an employer's terminal date. In *Goss*,[24] the ALJ twice granted an employer's motions for extensions of time in which to present evidence. Because the ALJ gave the employer additional time to submit evidence, additional transcripts favorable to the respondent were placed into the record. While the issue concerning the ALJ extending terminal dates was not raised on appeal, the Board concluded the employer was dilatory in scheduling the depositions and the ALJ erred in allowing the extensions of time. Therefore, the depositions were out of time and not considered by the Board.

The Court of Appeals disagreed:

> . . . [T]he statutory scheme specifically contemplates relaxed procedural rules to allow the parties to gather and present their evidence. We emphasize the directive does not contemplate or allow endless continuances or other procedural delays. But it does permit flexibility, exercised with discretion in light of case specific circumstances. Judge Clark took account of the situation in this case in granting the extensions, so it is difficult to discern an abuse of discretion on his part. The Board doesn't characterize his rulings that way, though that would be the appropriate standard by which to assess them.
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> . . .
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> We conclude that the Board's action in excluding the evidence taken after September 5 well captures an example of arbitrary agency decision-making. We reach that conclusion without hesitation or tremulousness. The remedy is plain. The Board must reconsider its determination of the claim taking account of all of the record evidence. [25]

Rivera and *Netherland* suggest the Board leans toward admitting, rather than excluding, evidence. Those cases both follow K.S.A. 44-523(a)'s mandate to avoid strict rules of procedure and to encourage flexibility. As for *Rivera*, the Board sees nothing wrong in making the evidentiary record consistent with the intent of the parties. The ALJ's decision in *Netherland* seemed rooted in a belief the employer was dilatory in scheduling some depositions, but not others. To the Board, it seemed odd to allow the employer to take future depositions, but exclude depositions already obtained. *Goss* shows an ALJ is allowed to assess the particular situation and be flexible in procedure. *Goss* also instructs the Board to review an ALJ's rulings on evidentiary deadlines under the abuse of discretion standard. That same standard applies to the admission of evidence for a district court judge, and under K.S.A. 44-551, for an ALJ.

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[24] *Goss v. Century Manufacturing, Inc.*, No. 108,367, 2013 WL 3867840 (Kansas Court of Appeals unpublished opinion filed July 26, 2013).

[25] *Id.* at *4.

D. The State was provided due process of law and the ALJ properly quashed the depositions of Mr. Harvey and Mr. Fitzgerald.

This case concerns basic fair play. The State had the reasonable *opportunity* to present evidence regarding whether Jensen's job ended due to cause. Testimony from Mr. Harvey and Mr. Fitzgerald could have been obtained at any time before the State's "eleventh hour" attempt to present such evidence.

The State asserts the ALJ's orders following the two prehearing settlement conferences show Jensen was not pursuing a work disability claim, and it had no need to defend against a non-existent theory of recovery. The subsequent orders obviously contain conflicting information as to Jensen's pursuit of a work disability claim. The State was not disadvantaged based on the contradictory statements.

At the motion to quash hearing, the State alleged it was unfair for Jensen to initially not assert entitlement to work disability benefits, only to later seek such benefits. The State asserts Mr. Harvey and Mr. Fitzgerald were only needed as rebuttal witnesses, and it did not need to defend against a work disability claim, until Jensen made her separation of employment an issue by testifying regarding her job loss at the regular hearing.

There is ample evidence the State knew Jensen was seeking work disability benefits before the regular hearing on October 10, 2019. Despite contradictory statements, the prehearing settlement conference orders contain allegations of a work disability claim. While the record does not prove when Jensen provided the State with Mr. Lindhahl's report dated July 13, 2019, or Dr. Rosenthal's letter dated July 24, 2019, those documents show Jensen was pursuing a work disability claim. The State hired Ms. Terrill for a work disability opinion, and Ms. Terrill interviewed Jensen on August 21, 2019. Standing alone, obtaining an expert report concerning work disability proves the State was aware Jensen was pursuing a work disability claim.

The ALJ carefully considered the procedural history of the case (he "took account of the situation" as did the ALJ in *Goss)*. The ALJ acknowledged his role in the orders containing contradictory information. A hearing was held on the motion to quash. The parties were allowed to present arguments. K.S.A. 44-523(a) requires the ALJ to give the parties the "reasonable opportunity to be heard and present evidence" in an "expeditious hearing[,]" but does not require the ALJ to admit any and all evidence at any time. Against the State's interest to present evidence, the ALJ considered prejudice to Jensen based on when the State announced the depositions of Mr. Harvey and Mr. Fitzgerald. The ALJ concluded it was unfair to Jensen for the State to wait until after Jensen's time to present evidence expired and, close to the last possible moment, raise a defense for the first time. The ALJ ruled the State came close to violating, or did violate, Jensen's due process rights. The Board does not find the ALJ abused his discretion in excluding evidence he viewed as an unfair and harmful surprise to Jensen. Independent of the ALJ's ruling, the Board, under de novo review authority, reaches the same result.

Even if the ALJ concluded the depositions should be excluded because the State had some duty to raise termination for cause as an affirmative defense, he reached the correct result.[26] The ALJ was concerned Jensen's due process rights were almost or actually violated based on the State raising a defense to a work disability claim after Jensen's right to put on evidence expired.

2. Jensen's work accident was the prevailing factor for her injury, medical condition, need for treatment and resulting impairment or disability.

The Board adopts the ALJ's analysis. Dr. Bishop, the court-ordered neutral physician, and Dr. Rosenthal identified the work-related accident as the prevailing factor. Only Dr. Moore did not do so. The weight of the credible evidence is in Jensen's favor.

3. As a result of her work-related injuries by accident, Jensen sustained a 13% functional impairment to the body as a whole and a 50.75% work disability.

The Board adopts the ALJ's legal conclusions regarding Jensen's functional impairment, her wage loss, her task loss and her percentage of work disability.

4. Jensen is entitled to future medical treatment.

K.S.A. 44-510h(e) presumes an employer's obligation to provide medical benefits terminates when the employee reaches maximum medical improvement. However, the presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement.

Drs. Bishop and Rosenthal indicated Jensen would more likely than not require future medical treatment. The ALJ's ruling on this issue is based on the evidence and affirmed.

CONCLUSIONS

The ALJ's decision is affirmed. The Board finds no error in the ALJ quashing the depositions of the State's witnesses. Jensen's work accident was the prevailing factor for her injuries, medical condition, need for treatment and resulting impairment or disability. As a result of her work-related injuries by accident, Jensen sustained a 13% functional impairment to the body as a whole and a 50.75% work disability. The Board adopts the ALJ's legal conclusions regarding Jensen's functional impairment, her wage loss, her task loss and her percentage of work disability. Jensen is entitled to future medical treatment.

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[26] See *Bouton v. Byers*, 50 Kan. App. 2d 34, 49, 321 P.3d 780 (2014), *rev. denied* 301 Kan. 1045 (2015) (A court may be affirmed if it reaches the right result for the wrong reason.).

AWARD

WHEREFORE, the Board affirms the ALJ's Award dated April 1, 2020.

IT IS SO ORDERED.

Dated this _____ day of August, 2020.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

Electronic copies via OSCAR to:
George Pearson
Nathan Burghart
Hon. Steven Roth